## Testimony Before Subcommittee on Early Childhood, Youth and Families, U. S. House of Representatives

### SCHOOL SAFETY ISSUES AS RELATES TO STUDENT DISCIPLINE AND THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

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Mr. Chairman and members of this subcommittee, I thank you for this opportunity to speak to these critical, but very difficult issues in providing a free, appropriate public education for all students in our public schools. We, in the Emanuel County School System, strive diligently to provide the best educational opportunity for all students in the least restrictive environment. While the May 1997 Reauthorization of the Individuals with Disabilities Education Act (IDEA) on the "surface" appeared to be less cumbersome and to provide educators with less restrictive options in the discipline of students with disabilities, detailed analysis of the total document reveals language that is very restrictive and extremely complex.

In the Emanuel County Public Schools, teachers and administrators are encouraged to implement strategies for discipline for inappropriate behavior at the lowest practical level and with the least interruption to the student's education experience.

For students who continue to be disruptive or commit serious offenses of the discipline codes, other discipline options are used. These options include, but are not limited to, the following strategies:

- Development of behavior management plans.
- Referral to a student support team with representatives from various agencies and professions, as appropriate.
- Assign to opportunity room or in-school suspension.
- Assignment to Saturday community service or tutorial class for 5<sup>th</sup> grade
   age equivalent and above students.

- Out-of-school suspension short term (10 days or less).
- Referral to system level student discipline tribunal.
- Alternative school placement. This is a regular school hours program which also provides special education services.
- Criminal acts are reported to the appropriate law enforcement agencies.
- Presently organizing a Student Transition and Recovery (STAR) program.
   This program provides before and after school military style discipline and keeps the students in regular classes during school hours.
- Long-term suspension or expulsion (more than 10 days). This option is only
  available through the system discipline tribunal. In most situations, the
  student is given the option of applying for enrollment in the alternative
  school program which provides special education services.

Due process is carefully followed in all these strategies. Any long-term suspension or

expulsion carries a right of appeal. Serious discipline situations are reviewed for due process and compliance with policies, state and federal laws, and regulations.

The above strategies work very well resulting in very few students ever reaching the point of being denied an education because of their behavior. Incidents involving weapons on school property or at school events, generally result in long-term suspension or expulsion for one year. In some situations, these students are given the option of applying for enrollment in the alternative school program.

The process works very well until we have to ask if the student is an IDEA or 504 student. The very question implies some kind of special treatment or discrimination against someone, especially when the behavior is not a manifestation of the disability. Students with disabilities are often just as dangerous as students without disabilities.

The reauthorization of IDEA provides that if the behavior is not a manifestation of the disability, the student can be disciplined as any other student. However, language was added that says the student must receive services. The services must enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals in the individual education plan.

The due process required for discipline of IDEA students who may be a serious danger to themselves or others, is very complex. As long as the parent is cooperative, there can usually be a reasonable solution. If the parent is uncooperative, the burden of proof shifts to the system and requires a more than preponderance of the evidence that maintaining a child in the current placement is substantially likely to result in injury to self or others. For violent behavior and weapons offenses, the system personnel need the right to use their judgment under the same due process rights and rights of appeal as any other student, regardless of the manifestation of disability.

Emanuel County Schools in collaboration with other agencies, provide many services to assist students and parents in the students' educational process.

These services include, but are not limited to the following:

- Counseling services at every school site, including the alternative school program.
- Nurse services at all school sites.
- Social work services at the system level.
- School resource officer services.
- Free family counseling services.
- Student assistance program counselors at the school sites.
- Child advocacy center to provide support and counseling in child abus situations.
- Close cooperation and direct support of the local district attorney's
  department, police and sheriff's departments, regional drug task force
  department of juvenile justice. These departments provide assistance
  conduct of special classes, counseling students on crime-related matte
  conduct of school safety checks, etc.
- Interagency staffing for students and parents to minimize redundant services and to collaborate in all areas of service and expertise.
- Multidisciplinary staffings for child abuse victims, perpetrators and far
- Health check physicals and health counseling at the school sites or ref as appropriate.
- Emanuel County Youth Enrichment program. This program provides
   Saturday community service, academic tutorial/make-up classes, and
   parenting classes.

- Special education qualified teacher(s) for the alternative school program.
- Homelessness liaison services for homeless students and families.
- Migrant education specialist services.

Yet to be seen is how the courts will interpret this complex and confusing law and the accompanying regulations. I have enclosed a series of four charts prepared for a school board attorney seminar held May 21, 1999, at Mercer University. This is a major attempt to simplify the new IDEA regulations. It is the best attempt I have seen. (see attachment)

After you have read the charts, imagine yourself in the position of a school site administrator whose job it is to improve the education process, improve test scores, provide a free, appropriate education for all students, and comply with the myriad of laws and regulations impacting education today. Treating violent IDEA/504 students differently from other students, can lead to confusion, indecisiveness, and reluctance to act for fear of being found liable for the action taken, even though acting in good faith.

We, in Emanuel County School System, appreciate your efforts in addressing this critical subject that can greatly impact school safety and academic progress for all students.

#### Chart 1

ATTACHMENT

Code of Conduct Violations By Students with Disabilities Resulting in Disciplinary Consequences of 10 School Days or Less (Revised)

Student commits code of conduct violation for which the disciplinary consequence would result in removal from the student's placement for 10 consecutive school days or less.

School personnel may assign the consequence applicable to nondisabled students for a similar period of time, not to exceed 10 consecutive school days. Reg. 300.520(a)(1)(i).

During the first 10 cumulative school days of removal in one school year, the school does not have to provide any services to the student if nondisabled students would not receive services.

Reg. 300.121(d)(1).

School personnel may continue to remove the student for disciplinary reasons for up to 10 school days at a time throughout the same school year for separate incidents of misconduct, so long as the removals do not constitute a change of placement under Reg. 300.519(b), and are those which would be applied to nondisabled. Reg. 300.520(a)(1)(i).

A series of disciplinary removals each for 10 consecutive school days or less may result in a change of placement if they cumulate to more than 10 school days in one school year. School personnel should analyze the length of each removal, the proximity of the removals to each other, and the total amount of time the child is removal would result in a change of placement, a manifestation determination review (MDR) must be done first. Reg. 300.523(a).

Beginning with the 11th day of disciplinary removals in a school year, educational services must be provided. Reg. 300.520(a)(1)(ii); Reg. 300.121 (d)(2)(i)(A). If the removal does not result in a change of placement, school personnel, in consultation with the student's special education teacher, determine the services to be provided. Reg. 300.121(d)(3)(i).

The educational services to be provided must meet the standard of enabling the student to appropriately progress in the general curriculum and appropriately advance toward achieving the goals in the IEP. Reg. 300.121(d)(2)(i)(A).

Beginning with the 11th day of disciplinary removals in a school year, the IEP Team must address behavioral issues. If the removal does not result in a change of placement, the IEP Team must meet within 10 business days of first removing the student for more than 10 school days in a school year to develop a plan to conduct a functional behavioral assessment, if one was not conducted before the behavior that resulted in the removal. Reg. 300.520(b)(1)(i).

After the functional behavioral assessment is completed, the IEP Team meets as soon as practicable to develop a behavioral intervention plan to address the behavior and implement the plan. Reg. 300.520(b)(2).

If the student is assigned subsequent disciplinary removals in a school year for 10 school days or less that do not result in a change of placement, the IEP Team members (including the parent) informally review the behavior intervention plan and its implementation to determine if modifications are necessary. Reg. 300.520(c)(1).

If one or more team members believe modifications are needed, the IEP Team must meet to modify the plan and its implementation to the extent the IEP Team deems necessary. Reg. 300.520(c)(2).

If the student's IEP already includes a behavior intervention plan, within 10 business days of first removing the student for more than 10 school days in a school year, the IEP Team must meet to review the behavior intervention plan and its implementation, and modify the plan and its implementation as necessary to address the behavior.

Reg. 300.520(b)(1)(ii).

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Beginning with the 11th day of disciplinary removals in a school year, educational services must be provided. Reg. 300.520(a)(1)(ii); Reg. 300.121 (d)(2)(i)(A). If the removal does not result in a change of placement, school personnel, in consultation with the student's special education teacher, determine the services to be provided. Reg. 300.121(d)(3)(i).

The educational services to be provided must meet the standard of enabling the student to appropriately progress in the general curriculum and appropriately advance toward achieving the goals in the IEP. Reg. 300.121(d)(2)(i)(A).

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After the functional behavioral assessment is completed, the IEP Team meets as soon as practicable to develop a behavioral intervention plan to address the behavior and implement the plan. Reg. 300.520(b)(2).

If the student is assigned subsequent disciplinary removals in a school year for 10 school days or less that do not result in a change of placement, the IEP Team members (including the parent) informally review the behavior intervention plan and its implementation to determine if modifications are necessary. Reg. 300.520(c)(1).

If one or more team members believe modifications are needed, the IEP Team must meet to modify the plan and its implementation to the extent the IEP Team deems necessary. Reg. 300.520(c)(2).

If the student's IEP already includes a behavior intervention plan, within 10 business days of first removing the student for more than 10 school days in a school year, the IEP Team must meet to review the behavior intervention plan and its implementation, and modify the plan and its implementation as necessary to address the behavior. Reg. 300.520(b)(1)(ii).

#### Chart 2

Code of Conduct Violations By Students With Disabilities for Which Recommended Disciplinary Consequences Would Result in Change of Placement for More Than Ten School Days (Excluding Drug and Weapon Offenses)

(Revised)

Student violates code of conduct and the recommended disciplinary consequence would result in a removal from the current educational placement for more than 10 consecutive school days (suspension, in-school suspension, alternate placement, expulsion). This constitutes a change of placement. Reg. 300.519(a).

School personnel may remove from current educational placement for 10 school days or less (Reg. 300.520(a)(1)(i)), and recommend further discipline according to the code of conduct. (The 10-day-or-less alternative must be one equally applicable to nondisabled. See Chart 1 for educational services to be provided during a short removal.) If a criminal act has been committed, charges may be filed and law enforcement authorities to whom the crime was reported must be provided special education and disciplinary records to the extent disclosure is permitted by FERPA. Sec. 1415(k)(9). Reg. 300.529

The recommended disciplinary consequence may be for a removal from the current educational placement for less than 10 consecutive school days, but may constitute a change of placement because the student has already been removed for disciplinary reasons for 10 or more school days in the current school year, and the length of each removal, their proximity to each other, and the total amount of time the student has been removed result in a change of placement. Reg. 300.519(b).

At time decision is made to take this action, school personnel must notify parent of decision and provide procedural safeguards notice in Reg. 300.504. Sec. 1415(k)(4)(A)(i); Reg. 300.523(a)(1).

Within 10 business days, IEP Team and other qualified personnel must meet and review relationship between disability and the behavior subject to disciplinary action (manifestation determination review – MDR). Sec. 1415(k)(4)(A); Reg. 300.523(a)(2), (b). If there has been no previous functional behavioral assessment and creation of a behavior intervention plan the IEP Team must develop an assessment plan. Reg. 300.520(b)(1)(i). (As soon as practicable after the assessment, the IEP Team must meet again to develop and implement the behavior intervention plan. Reg. 300.520(b)(2)). If the IEP contains a behavior intervention plan, the IEP Team reviews the plan and its implementation and modifies them as necessary to address the behavior. Reg. 300.520(b)(1)(ii).

For the MDR, the IEP Team must look at all information relevant to the behavior subject to discipline such as evaluation and diagnostic results, including such results and other relevant information from the parent, observations of the student and the student's IEP and placement. The misbehavior is not a manifestation of the disability if the IEP Team finds that in relationship to the misbehavior subject to discipline.

- · the IEP and placement were appropriate;
- consistent with the content of the student's IEP and placement, special education services, supplementary aids and services and behavior intervention strategies were actually provided;
- the disability did not impair the ability of the student to understand the impact and consequences of the misbehavior, and
- the disability did not impair the ability of the student to control the misbehavior.
- Sec. 1415(k)(4)(C); Reg. 300.523(c).

If the IEP Team determines any of the standards were not met, the misbehavior was a manifestation of the disability, and no punishment may be assessed. Reg. 300.523(d). If IEP Team identifies deficiencies in IEP, placement or implementation, it must take immediate steps to remedy. Reg. 300.523(f).

-or -

If the IEP Team determines the misbehavior was not a manifestation of the disability, regular disciplinary consequences may be applied to the student except that the student must continue to be provided a free appropriate public education. Sec. 1415(K)(5)(A); Sec. 1412(a)(1)(A). Reg. 300.121(a); Reg. 300.524(a). The campus must ensure that special education and disciplinary records are transmitted for consideration by the school district person making the final determination regarding the disciplinary action. Sec. 1415(k)(5)(B); Reg. 300.524(b).

Parent may appeal a finding that the misbehavior was not a manifestation of the disability. The hearing is expedited before a special education hearing officer who applies the same standards as the IEP Team. Sec. 1415(k)(6); Reg. 300.525(a), (b).

If IEP Team finds no manifestation and changes placement to comply with the disciplinary recommendation, parent may appeal the placement decision. The hearing is expedited before a special education hearing officer.

Sec. 1415(k)(6)(A); Reg. 300.525(a)(2).

During appeals, stay put applies. Reg. 300.524(c). If child is substantially likely to injure self or others in the current placement, the school can request an expedited hearing and request the hearing officer to remove to an interim alternative educational placement for up to 45 days. Standards to be met are those in Sec. 1415(k)(2) and Reg. 300.521.

The standard the educational services must meet is that they enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals in the IEP. Reg. 300.121(d)(2)(i)(B); Reg. 300.524(a). The IEP team must determine what services are necessary to meet this standard. Reg. 300.121(d)(3)(ii).

#### Chart 3

# Drug and Weapon Offenses by Students With Disabilities (Revised)

Student carries weapon to school, or possesses, uses, sells or solicits sale of illegal-drug or controlled substance on school property or at a school function.

School personnel may remove from current educational placement for 10 school days or less, and recommend further discipline according to the code of conduct. Sec. 1415(k)(1)(A)(i); Reg. 300.520 (a)(1)(i). (The 10-day-or-less alternative must be one equally applicable to nondisabled. See Chart 1 for educational services to be provided during a short removal.) If criminal act has been committed, charges may be filed and special education and disciplinary records shall be transmitted to law enforcement authorities to whom the crime was reported, to the extent disclosure is permitted by FERPA. Sec. 1415(k)(9); Reg. 300.529.

At time decision is made to take this disciplinary action, school personnel must notify parent of decision and provide procedural safeguards notice in Reg. 300.504. Sec. 1415(k)(4)(A)(i); Reg. .00.523(a)(1).

Within 10 business days, IEP Team must meet and may extend the removal by placing student in appropriate interim alternative educational setting applicable to nondisabled student for same amount of time nondisabled student would be assigned but not more than 45 calendar days. Sec. 1415 (k)(1)(A)(ii) and (3)(A); Reg. 300.520(a)(2); Reg. 300.522(a). IEP Team must review the behavior intervention plan, if one exists, and its implementation and modify, as necessary, to address behavior. Reg. 300.520 (b)(1)(ii). If there has been no previous functional behavioral assessment and creation of behavior intervention plan, IEP Team must develop assessment plan. Sec. 1415 (k)(1)(B); Reg. 300.520(b)(1)(i). (As soon as practicable after the assessment, the IEP Team must meet again to develop and implement the behavior intervention plan. Reg. 300.520(b)(2)). The IEP Team and other qualified personnel must review the relationship between disability and the behavior subject to disciplinary action (manifestation determination review-MDR). Sec. 1415(k)(4)(A); Reg. 300.523(a)(2), (b).

Illegal drug – a controlled substance. Excludes legally used and possessed prescription drugs. Sec. 1415(k)(10)(B); Reg. 300.520(d)(2).

Controlled substance – drug or substance in 21 U.S.C. § 812(c), Schedules I.-V. Sec. 1415(k)(10)(A); Reg. 300.520(d)(1).

Weapon – A firearm and more. Something used for or readily capable of causing death or serious bodily injury. Excludes pocket knife with blade of 2-1/2 inches or less. Sec. 1415(k)(10)(D); Reg. 300.520(d)(3).

The 45 day alternative interim placement must:

- enable student to progress in general curriculum, although in another setting;
- enable the student to continue to receive those services and modifications, including those described in the student's current IEP, that will enable the student to meet the goals set out in that IEP; and
- include services and modifications designed to address the drug or weapon offense so that it does not recur. Sec. 1415(k)(3)(B); Reg. 300.522; Reg. 300.121(d)(2)(ii).

Comments to regulations: Student may be subject to multiple 45 day interim placements for separate drug and weapon offenses. The 45 day interim placement may be completed even if drug or weapon offense was manifestation of disability. If misbehavior was not a manifestation of disability, regular disciplinary consequence can be applied in addition to 45 day interim placement.

For the MDR, the IEP Team must look at all information relevant to the behavior subject to discipline such as evaluation and diagnostic results, including such results and other relevant information from the parent, observations of the student and the student's IEP and placement. The misbehavior is not a manifestation of the disability if the IEP Team finds that in relationship to the misbehavior subject to discipline.

· the IEP and placement were appropriate;

 consistent with the content of the student's IEP and placement, special education services, supplementary aids and services and behavior intervention strategies were actually provided:

 the disability did not impair the ability of the student to understand the impact and consequences of the misbehavior; and

 the disability did not impair the ability of the student to control the misbehavior.
 Sec. 1415(k)(4)(C); Reg. 300.523(c).

If the IEP Team determines any of the standards were not met, the misbehavior was a manifestation of the disability, and no punishment may be assessed. Reg. 300.523(d). If IEP Team identified deficiencies in IEP, placement, or implementation, it must take immediate steps to remedy. Reg. 300.523(f).

-or -

If the IEP Team determines the misbehavior was not a manifestation of the disability, regular disciplinary consequences may be applied to the student except that the student must continue to be provided a free appropriate public education. Sec. 1415(k)(5)(A); Sec. 1412(a)(1)(A). Reg. 300.121(a); Reg. 300.524(a). The campus must ensure that special education and disciplinary records are transmitted for consideration by the school district person making the final determination regarding the disciplinary action. Sec. 1415(k)(5)(B); Reg. 300.524(b).

Parent may appeal a finding that the misbehavior was not a manifestation of the disability. The hearing is expedited before a special education hearing officer who applies the same standards as the IEP Team. Sec. 1415(k)(6); Reg. 300.525(a), (b).

Parent may appeal decision to place student in 45 day interim placement. The hearing is expedited before a special education hearing officer who applies the standards regarding a dangerous student in Reg. 300.521. Sec. 1415(k)(6)(B)(ii); Reg. 300.525(b)(2).

When a parent requests a hearing in a drug or weapon case to challenge the interim alternative placement or the manifestation determination. student remains in interim placement until decision of hearing officer or 45 days expires. whichever comes first unless the parent and school agree otherwise. Reg. 300.526(a). Then student returns to current placement (defined as placement prior to interim alternative educational setting). School can ask for expedited hearing before special education hearing officer to prevent this return if the student is substantially likely to injure self or others. Reg. 300.526(b), (c). The hearing officer applies the standards in Reg. 300.121. Reg. 300.526(c). Hearing officer can order another placement for up to 45 days. Reg. 300.526(c)(3). This procedure may be repeated as necessary. Sec. 1415(k)(7); Req. 300.526(c)(4).

The standard the educational services must meet is that they enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals in the IEP. Reg. 300.121(d)(2)(i)(B); Reg. 300.524(a). The IEP team must determine what services are necessary to meet this standard. Reg. 300.121(d)(3)(ii).

# Chart 4 Students Dangerous to Self or Others (Revised)

IDEA discipline procedures are followed for a non-drug or weapon offense, the penalty for which would result in expulsion or removal from the student's placement for more than 10 school days.

IEP Team meets, determines no manifestation and recommends discipline proceed. Parent disagrees and requests a due process hearing. Stay put applies and child stays in the current placement unless school acts to change the placement. Reg. 300.524.

School requests hearing officer to change the placement during the pendency of the hearing because of the likelihood of injury to self or others. Sec. 1415(k)(2); Reg. 300.521.

Hearing officer holds expedited hearing to consider request. School has burden of proof to show by more than a preponderance of the evidence that maintaining the child in the current placement is substantially likely to result in injury to self or others. Sec. 1415(k)(2)(A), (10)(D); Reg. 300.521(a). Hearing Officer must also

- consider the appropriateness of the current placement
- consider whether the school has made reasonable effort to minimize the risk of harm in the current placement, including the use of supplemental aids and services
- determine that the interim alternative setting proposed by the school personnel, in consultation with special education teacher
  - enables the student to participate in the general curriculum, although in another setting
- enables the student to continue to receive those services and modifications, including those described in the student's current IEP, that will enable the student to meet the goals set out in the IEP; and
- include services and modifications designed to address the behavior so that it does not recur.

Sec. 1415(k)(2); Reg. 300.521(b), (c), (d); Reg. 300.522(b); Reg. 300.121(d)(2)(ii)(B).

If parent appeals 45 day interim alternative placement by IEP Team in drug or weapon case, hearing officer applies these standards in expedited hearing. Sec. 1415(k)(6)(B)(ii); Reg. 300.525(b)(2)

If all requirements are met, hearing officer may order a change of placement to the interim alternative educational setting for up to 45 days. Sec. 1415(k)(2); Reg. 300.521.

Student returns to his or her current placement (the placement prior to the interim alternative educational setting) at end of 45 days if no decision has been issued by hearing officer in pending due process hearing. If school believes it would be dangerous for student to return to current placement while hearing is still pending, school may request another expedited hearing to again place student in 45 day interim placement while hearing continues to be pending. Reg. 300.526(b), (c)(4). Hearing officer holds same type of hearing initially held when hearing officer ordered first 45 day interim placement. Sec. 1415(k)(7); Reg. 300.526. Any subsequent 45 day interim setting must meet the standards in Reg. 300.522.